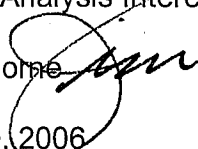




OFFICE OF  
INSURANCE COMMISSIONER

## MEMORANDUM

TO: Market Analysis Interested Parties

FROM: Jim Odiome 

DATE: April 19, 2006

RE: Response to comments on Sections 10, 11, and 12 of Z Draft

The Office of the Insurance Commissioner (OIC) is a state regulatory agency whose mission is to protect consumers, the public interest, and our state's economy through fair and efficient regulation of the insurance industry.

Thank you once again to all who provided comments. The comments, as they were received, are attached for your review. We are reviewing the comments internally and with the assistance of verbal comments next week, some comments are likely to be included in a revised draft.

Some of your comments deal with what I would characterize as "administrative" issues that may not be appropriate to address in statute. In our discussion next week, can we consider adding a specific grant of rule-making authority to address "administrative" issues?

I look forward to our face-to-face discussion at 1:30 pm on April 26. If you plan to participate by conference call, please notify Brenda Davis at [BrendaD@oic.wa.gov](mailto:BrendaD@oic.wa.gov) by noon on Tuesday, April 25.

## Jim Odiorne

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**From:** Christian Rataj [crataj@namic.org]  
**Sent:** Wednesday, April 19, 2006 9:32 AM  
**To:** Beth Berendt; Jim Odiorne  
**Subject:** NAMIC's Comments on Market Conduct Surveillance Model Act - Sections 10, 11 and 12



WA Market Conduct  
Analysis Com...

Enclosed please find NAMIC's Comments on the Market Conduct Surveillance Model Act,

Sections 10, 11 and 12 of "Z draft". Have a wonderful day! CJR

Christian John Rataj, Esq.  
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April 18, 2006

The Honorable Mike Kreidler  
Insurance Commissioner  
State of Washington  
5000 Capitol Way  
Tumwater, Washington 98501

sent via email to:  
[BethB@OIC.WA.GOV](mailto:BethB@OIC.WA.GOV)  
[JimO@OIC.WA.GOV](mailto:JimO@OIC.WA.GOV)

**Re: NAMIC's Comments on Market Conduct Surveillance Model Act  
Sections 10, 11 and 12 of "Z draft"**

Dear Commissioner Kreidler:

Thank you for affording the National Association of Mutual Insurance Companies (NAMIC) and members of the insurance industry an opportunity to provide you with a statement of our thoughts and concerns in regard to the above captioned sections of the proposed Market Conduct Surveillance Model Act.

NAMIC is a full-service national trade association with more than 1,400 member companies that underwrite approximately 43 percent (\$196 billion) of the property/casualty insurance premium in the United States. NAMIC membership includes four of the seven largest property/casualty insurance carriers in the nation, and every size regional, national and state specific property/casualty insurer, including hundreds of farm mutual insurance companies. NAMIC has 110 member insurance carriers doing business in the state of Washington, who write approximately 31% of the property/casualty insurance business in the state.

On behalf of NAMIC, I respectfully submit the following comments on Sections 10, 11 and 12 of the proposed draft legislation ("Z Draft") which has been distributed by your staff for industry feedback.

**Section 10 of the "Z Draft"**

NAMIC is concerned with the following aspects of Section 10(1):

Section 1 states, "[m]arket regulation personnel shall be qualified by education, experience, *or* professional designations." [Emphasis added]. NAMIC suggests that the

“or” be replaced with “and” so as to ensure that the all market regulation personnel have an appropriate level of education and experience necessary to address the complex insurance issues that may be evaluated by the OIC during a market conduct analysis action. A mere professional designation does not, in and of itself, demonstrate that the proposed market regulation professional has the requisite understanding of the intricacies of the insurance industry necessary to competently participate in a market conduct analysis action.

NAMIC is also concerned that Section 1 does not set forth any restrictions or limitations upon the Commissioner’s discretion to determine that outside professional assistance is necessary. Since insurance carriers and ultimately their consumers will be required to pay the cost of retaining outside professional assistance, the proposed regulation should articulate some administrative guidelines for determining whether retaining outside professional assistance is necessary, reasonable, and appropriate. NAMIC believes that it is important to proactively control market conduct examination costs for the benefit of insurance consumers.

NAMIC is concerned with the following aspects of Section 10(2):

According to Black’s Law Dictionary, a conflict of interest is a “term used in connection with public officials and fiduciaries and their relationship *to matters of private interest* or gain to them.” [Emphasis added].

In essence, the conflict of interest doctrine is intended to protect against unfair preferential treatment being tendered by a regulator or official, whose “personal” or “private” interest is inconsistent with his/her “professional” interest in the outcome of the market conduct examination. This “personal” bias could be either *for or against* the subject of the market conduct examination.

The “conflict of interest” provision of the proposed regulation only addresses potential conflict of interest situations where the market regulation professional has a “personal” interest *in favor of* the welfare of the subject insurance carrier that may be in conflict with his/her “professional” responsibilities as a market conduct examiner.

However, the proposed regulation does not address conflicts of interest that may arise from the market regulation professional’s “personal” interest that is *against* the welfare of the subject insurance carrier. For example, a market regulation professional, who has had an unfavorable personal experience with the subject carrier may have personal animus toward the subject carrier that could unfairly influence his/her objectivity and ability to render an unbiased evaluation of the subject carrier’s market conduct.

According to the language of the proposed regulation, the Commissioner could appoint a market regulation professional, who is currently a present claimant or litigant in a legal action against the subject carrier. Thus, NAMIC believes that insurance carriers should be afforded an opportunity to contest the appointment of any non-departmental market conduct examination contractor, who has a past or present “personal” interest or

relationship with the subject carrier that could adversely impact the professional's ability to be objective and impartial.

### **Section 11 of the "Z Draft"**

NAMIC is concerned with the following aspect of Section 11 (1) and (2):

Conceptually, NAMIC is not opposed to the idea of providing general tort immunity for market conduct surveillance personnel engaged in the good faith execution of their professional services. However, since protecting the confidentiality of insurers' proprietary information, documentation and data is of paramount importance to the insurance industry, the tort immunity stated in Sections 11 (1) and (2) should be limited so as not to provide protection for negligent disclosure of insurers' confidential and/or proprietary information. As a general risk management principle, individuals who are burdened with exposure to tort liability for their negligence are more likely to engage in cautionary practices designed to prevent the occurrence of said negligence. Thus, in the interest of protecting confidentiality, market conduct surveillance personnel should not be relieved of civil liability for negligent disclosure of confidential and/or proprietary insurer information, documentation and data.

Further, since insurance carriers have a legal duty to their policyholders' and/or shareholders' to safeguard confidential and/or proprietary information, insurance carriers are duty bound to advocate for the implementation of OIC risk management procedures designed to protect against the accidental disclosure of their policyholders' and/or shareholders' information, documentation and data. Therefore, NAMIC respectfully requests that the immunity provisions of Section 11 be re-drafted so as to exclude immunity for the negligent disclosure of confidential and/or proprietary information.

### **Section 12 of the "Z Draft"**

Section 12 states that "fines and penalties levied as a result of a market action or examination shall be consistent, reasonable and justified." In the interest of facilitating consistency and uniformity in the sanctioning of insurance carriers, who have failed to comply with lawful insurance practices, NAMIC believes that Section 12 should include a provision that sets forth the procedural framework the Commissioner shall be required to follow when determining whether to impose fines and/or penalties, and in calculating the amount of the fines and/or penalties to be levied.

Additionally, Section 12 should include a provision that addresses when and how an insurance carrier may appeal the Commissioner's decision to impose fines and/or penalties, and the amount of the fines and/or penalties levied.

Thank you for affording NAMIC and the insurance industry an opportunity to provide comments on Sections 10, 11 and 12 of the proposed "Z Draft". I look forward to working with you and the rest of the insurance industry on drafting this legislation.

Respectfully,

Christian John Rataj, Esq.  
NAMIC Western State Affairs Manager

**Jim Odiorne**

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**From:** AWHP [AWHP@comcast.net]  
**Sent:** Wednesday, April 19, 2006 10:31 AM  
**To:** Jim Odiorne; Beth Berendt  
**Subject:** Mkt Analysis Z-Draft Sections 10, 11, 12 Comments



Jim

Thank you for the opportunity to provide AWHP's comments (attached) regarding Sections 10, 11 & 12 of the OIC's Market Analysis Z-Draft bill.

Please don't hesitate to give me a call (425-396-5375) if I can answer any questions, or if you would like to discuss.

Sydney

Association of Washington Healthcare Plans  
Sydney Smith Zvara, Executive Director  
7252 Fairway Ave SE  
Snoqualmie, WA 98065  
425-396-5375 Tel  
425-396-5372 Fax  
AWHP@comcast.net

4/19/2006



The Association of Washington Healthcare Plans

April 19, 2006

Sent via E-Mail & U.S. Postal Service

Jim Odiorne  
Deputy Insurance Commissioner  
Washington State Office of Insurance Commissioner  
PO Box 40255  
Olympia, WA 98504-0255

Re: Market Analysis Z-Draft  
Sections 10, 11 & 12

Dear Jim,

On behalf of AWHP's member healthcare plans, we appreciate the opportunity to comment on the Office of Insurance Commissioner's (OIC's) efforts to develop a legislative proposal for Market Regulation and Surveillance. In addition we would like to convey our appreciation for OIC incorporation of a number of insurer suggestions into the most recent Z-Draft revision.

We would like to note, however, that the overall reservations we have previously expressed regarding the need for and scope of the legislative proposal continue to apply. We also continue to be concerned that the proposed draft will not replace existing market conduct examinations but rather will overlay the current structure with yet another process for examining carriers' market practices.

In accordance with the OIC's Market Analysis Project schedule, we offer the following additional comments and suggestions regarding Sections 10, 11 & 12 of the proposed draft, for your consideration.

**Section 10 –Market Conduct Surveillance Personnel**

Subsection (1) contains a reference to OIC using "outside professional assistance" or outside consultants, as does existing law. Based on OIC statements however, it is our understanding the commissioner will not use outside consultants for Market Conduct Examinations. Consistent with previous AWHP comments, we suggest removing these references. If however, OIC chooses to retain these references, we recommend adding language early in the Z-Draft to clarify under what circumstances and how outside consultants would be used. In addition, we suggest limiting costs for outside contractors to no more than 125% of those for the commissioner's own examiners.

**Section 11– Immunity for Market Conduct Surveillance Personnel**

This section establishes immunity for market conduct surveillance personnel when the individual is acting in good faith while carrying out his or her responsibilities under the Act. We note, however, that there are no guidelines for remediation to address situations when there is misconduct. We suggest adding



language to establish parameters and a process to be followed should concerns arise regarding possible misconduct on the part of market conduct surveillance personnel.

As with several other sections of the Z-Draft, this section of the proposed legislation overlaps existing law. We continue to be concerned that the proposed draft will not replace existing market conduct examinations but rather will overlay the current structure with yet another process for examining carriers' market practices. We are also concerned that duplicative provisions and references can result in inconsistencies and confusion.

## **Section 12-- Fines and Penalties**

Consistent with above comments, we are also concerned with overlaps between this section and existing law.

We appreciate the language included in Subsection (1) that requires fines and penalties to be consistent, reasonable and justified, and would further suggest providing specific definitions for these terms. As suggested in AHIP's letter, we also recommend development of guidelines that outline the factors and considerations that will be used by OIC when levying penalties as a result of a market conduct action or examination. We also support AHIP's earlier proposal to add a provision to this section that would establish an alternate dispute resolution mechanism for insurers.

Subsection (2) indicates that the Commissioner shall take into consideration actions taken by insurers in compliance with best practices organizations. In support of Market Conduct goals to improve the effective use of resources, we suggest deeming insurers in compliance for areas already approved in the performance findings of best practice and accreditation organizations, as does the Medicare program.

Again, we appreciate the opportunity to provide our comments and suggestion, and hope they will be of assistance.

Sincerely,

Sydney Smith Zvara  
Executive Director

**Jim Odiorne**

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**From:** Pelovitz, Betsy [BPelovitz@ahip.org]  
**Sent:** Wednesday, April 19, 2006 10:50 AM  
**To:** Jim Odiorne  
**Cc:** Jones, Christian; Beth Berendt; sorensen@carneylaw.com  
**Subject:** AHIP Comment Letter on Sections 10, 11 and 12 of OIC Z draft on Market Conduct

Deputy Commissioner Odiorne-

Please accept the attached written comments on behalf of America's Health Insurance Plans (AHIP) regarding the sections 10, 11 and 12 of the Office of the Insurance Commissioner's revised z-draft on market conduct.

Feel free to contact me with any questions.  
Thank you.  
Betsy

Betsy M. Pelovitz  
Regional Director, State Advocacy  
America's Health Insurance Plans  
601 Pennsylvania Ave., NW, Suite 400  
Washington, DC 20004  
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202.778.8492 (fax)  
[bpelovitz@ahip.org](mailto:bpelovitz@ahip.org)

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4/19/2006

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April 19, 2006

Deputy Commissioner James Odiorne  
Washington State Office of the Insurance Commissioner  
5000 Capitol Way  
Tumwater, Washington 98501

Re: Market Conduct Surveillance Model Act  
Sections 10, 11 and 12 of 4/6 Z draft

Dear Deputy Commissioner Odiorne:

On behalf of America's Health Insurance Plans (AHIP), we appreciate the opportunity to comment on the Office of the Insurance Commissioner's (OIC's) efforts to develop a legislative proposal for a Market Conduct Surveillance Model Act. AHIP is the national trade association representing nearly 1,300 member companies providing health insurance coverage to more than 200 million Americans.

We appreciate the OIC's efforts to adopt language that incorporates the uniform standards developed by the National Association of Insurance Commissioners (NAIC) and the National Council of Insurance Legislators (NCOIL) with respect to state market analysis and market conduct programs. Please accept this correspondence in response to your request for comments on sections 10, 11 and 12 of the OIC's Z draft. As you will note from our below comments, we have no suggestions or concerns regarding the provisions of section 10, entitled Market Conduct Surveillance Personnel. However, we wanted to specifically acknowledge our thanks for the revisions that have already been made to this section by the OIC in response to comments previously submitted by interested parties. Thank you for time and consideration of these comments.

Section 11 – Immunity for Market Conduct Surveillance Personnel

The provisions establishing immunity to market conduct surveillance personnel under section 11 of the 4/6 z-draft provides protections when the individual is acting in good faith while carrying out his or her responsibilities under the Act. However, we note that there are no guidelines for remediation to address situations when there is misconduct. While we believe that such situations would be a rare occurrence, our membership would like to have language included in the Model that establishes parameters and a process to be followed when there is a concern that there is misconduct on the part of the market conduct surveillance personnel.

April 19, 2006

Page 2



Section 12 – Fines and Penalties

We acknowledge and appreciate the language in subsection 1 that requires that fines and penalties be consistent, reasonable and justified; however, we note that there are no definitions of these terms. In order to ensure transparency and to set clear expectations, we recommend the development of guidelines that outline the factors, both mitigating and aggravating, and other considerations that will be utilized by the OIC when levying penalties as a result of a market conduct action or examination.

Thank you for the opportunity to provide comments on this matter and we look forward to continuing to work with the OIC on this legislative proposal. Please feel free to contact us with any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Betsy M. Pelovitz". The signature is fluid and cursive, with the first and last names being more prominent.

Betsy M. Pelovitz  
Regional Director

cc: Melvin Sorenson, Carney Badley Spellman, PS

**Jim Odiorne**

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**From:** Ken Cooley [ken.cooley.cxix@statefarm.com]  
**Sent:** Wednesday, April 19, 2006 10:55 AM  
**To:** Jim Odiorne  
**Cc:** Beth Berendt  
**Subject:** Comment Sections 10, 11 & 12 of the Z Draft

The Honorable Mike Kreidler  
Insurance Commissioner  
State of Washington  
5000 Capitol Way  
Tumwater, Washington 98501

Re: Comments on Market Conduct Surveillance Model Act  
Sections 10, 11 & 12 of Z draft

Dear Commissioner Kreidler,

On behalf of the State Farm Insurance Companies, I have reviewed the indicated Sections of the Z Draft as revised on April 6th.

As I indicated in our last meeting in Tumwater, in my professional experience I have encountered examination personnel who appear to maintain a too close relationship with outside litigators who had an acute interest in knowing the details of an ongoing examination and who could gain from how the regulator characterized the results of an examination in publicly released documents. Given that background and real-life experience, while the personnel conflict of interest subdivision of Section 10 is worded in a reasonable way, I urge that some mechanism be provided which would allow an insurer to request a review of the personnel assigned in a given matter and also to bar correspondence or discussion of pending examinations with members of the plaintiff's bar except through the Commissioner or a senior Deputy.

In general, the addition of standards governing the selection of outside examiners and how the compensation rate for such examiners will be set would be of interest as furthering the goal of promoting cost-effective regulation, and reasonable transparency in a matter of substantial interest to insurers, where greater transparency would seem to carry little, if any, downside to the work of regulation.

Onward and Upward,

Ken Cooley  
Counsel  
State Farm Corporate Law Department

4/19/2006

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